Filed 5/17/10 P. v. Chho CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SAKHON CHHO, Defendant and Appellant.	H034693 (Santa Clara County Super.Ct.No. CC822335)

Defendant Sakhon Chho pleaded no contest to one count of possession of marijuana for sale and received a three-year grant of probation. On appeal, he challenges the trial court's denial of his motion to suppress evidence police had obtained as a result of an officer viewing text messages appearing on Chho's cell phone during a vehicle stop. The officer viewed the messages after he had discovered some marijuana under the driver's seat inside Chho's car and 4.82 ounces of it in the trunk during a consensual search. The text messages suggested that Chho was engaged in drug sales. Chho contends that the officer lacked probable cause to view the messages. On the facts of this case, we reject his claim and affirm.

STATEMENT OF THE CASE

I. *Factual Background*[1]

On September 28, 2008, at just before 5:00 in the evening, San Jose Police Officer Jason Cook, accompanied in his patrol car by his field training officer, saw a car making a right turn onto Bascom Avenue in San Jose. The car was missing its front license plate, a violation of Vehicle Code section 5200, subdivision (a). Officer Cook directed the car to stop using his lights and sirens and the driver complied by pulling over into a parking lot. The driver, later identified as defendant, was alone in his car and he gave the officer his driver's license and registration. Officer Cook then asked defendant if he was on probation or parole and "if there was anything in the car [the officer] needed to worry about," "like drugs or weapons." Defendant immediately offered that he had "a little bit of marijuana under the seat" and he began to reach for it, saying "Do you want me to get it out for you?" Officer Cook responded by saying, "No, that's okay." "If you don't mind, I'll get it" or something to that effect. Defendant was cooperative and said, "Okay." He also said that he had "a cannabis card."

Officer Cook then asked defendant to get out of the car and defendant complied. The officer conducted "a quick outer frisk [of his person] for weapons" and found nothing. The officer then directed defendant to sit on the curb and Cook's field training officer stood next to him. Officer Cook asked defendant if he could search the car and recover "what was under his seat" and defendant replied, "Yeah, go ahead." Officer Cook first looked under the driver's seat, finding a six or eight inch "cylinder-type container" with a "green-leafy substance" inside that the officer recognized as marijuana. The officer also noticed a cell phone in the front area of the car near the driver's seat or in

[1] We take the facts largely from the evidence presented at the hearing on the motion to suppress, which includes portions of reporter's transcript from the preliminary hearing.

the center console, which was repeatedly ringing. The phone had been in defendant's hand and he had put it down inside the car when he got out of it. At that point, Officer Cook left the phone where it was.

Having found the marijuana under the seat, Officer Cook next asked defendant if he could search the trunk of the car. Defendant briefly paused, "kind of rolled his eyes" and slouched his shoulders, but slowly said, "Yeah." The officer opened the trunk and immediately saw a container resembling the one under the seat. Without touching the container, Officer Cook asked defendant what was inside and he responded, "More marijuana." The officer then opened the container and found about five times more marijuana than was in the other container, bringing the total to 171.6 grams (6.05 ounces).

While Officer Cook was looking in the trunk, defendant's cell phone was still ringing continuously inside the car. After finding the marijuana in the trunk, the officer grabbed the cell phone from inside the car, opened it, and read two text messages.[2] According to the officer, based on his training experience,[3] the continuous ringing of defendant's cell phone during the stop, coupled with the officer's discovery of what turned out to be more than six ounces of marijuana in the trunk, led him to suspect that defendant may be engaged in drug dealing or other illegal activity. Because of this suspicion, and for investigatory purposes, he looked at and read the two incoming text messages. The first one said, "A homie its me lil locs from Sequoia Glen Apts. I need an

[2] The officer could not remember while testifying whether the messages immediately appeared on the phone's screen when he opened it or whether he had to manipulate the phone in some way in order to see the messages. But there is no evidence that the messages could only be viewed by using a password or other privacy protection mechanism.

[3] At the time, Officer Cook was a relatively new police officer and had had about six months training while on the police force. This was his first arrest for drug sales.

eighth if u can. Hit me up." The second one said, "A bro, I'm still tryin to get that so hit me up when u r back this way." The officer did not notice how old the messages were and he did not know how long the phone would retain them. There is no evidence that he searched the phone further by viewing or retrieving any other incoming or outgoing messages.

Officer Cook then arrested defendant.

II. *Procedural Background*

Defendant was charged by felony complaint with one count of possession of marijuana for sale in violation of Health and Safety Code section 11359 (count 1) and one count of transportation and distribution of marijuana in violation of Health and Safety Code section 11360, subdivision (a) (count 2). The complaint also alleged two prior juvenile strikes (both assault with a firearm with personal infliction of great bodily harm and personal use of a firearm). Defendant was bound over for trial after a preliminary hearing and the same charges were later alleged by information.

Defendant made a motion to suppress evidence under Penal Code section 1538.5, ultimately targeting Officer Cook's search of his cell phone and retrieval of the two text messages. Defendant contended that he had not given his consent for Officer Cook to search the phone and that the search was not proper either as incident to defendant's arrest or based on the automobile exception to the warrant requirement. The court denied the motion, concluding that Officer Cook searched defendant's cell phone "based upon the officer's reasonable belief supported by probable cause that the cell phone contained evidence of drug sales."

After his motion to suppress was denied, defendant pleaded no contest to count one with count two to be dismissed at sentencing. One of the juvenile strikes was dismissed in the interests of justice. Defendant waived a jury trial of the other juvenile strike, and the court later found that allegation to be true. Defendant then filed a *Romero*

motion[4] under Penal Code section 1385 to dismiss the remaining juvenile strike in the interests of justice, which the trial court granted. The court suspended imposition of sentence and placed defendant on three years formal probation. He was sentenced to 350 days in the county jail, which with credit for time served was deemed satisfied, and the court imposed various fines and fees.

Defendant timely appealed.

DISCUSSION

I. *Issue on Appeal and Standard of Review*

On appeal, defendant reprises his challenge to the search of his cell phone, contending that it violated his Fourth Amendment rights. The thrust of his challenge is the theory that modern cell phones are like computers and they are therefore afforded the same elevated privacy protections. He further contends that because of the commonplace use of cell phones by much of the population, that his cell phone continuously rang during the traffic stop could not have any tendency in reason to suggest that he was engaged in drug dealing. Moreover, he argues, even if the seizure of his phone was proper, a warrant was still required in any event for police to access the phone's contents.

"The standard of appellate review of a trial court's ruling on a motion to suppress evidence is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362; accord, *People v. Panah* (2005) 35 Cal.4th 395, 465.) In assessing the reasonableness of searches and seizures, we apply federal constitutional standards. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1156, fn. 8.) At the trial court, the "prosecution has the burden of

[4] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

establishing the reasonableness of a warrantless search." (*People v. Jenkins* (2000) 22 Cal.4th 900, 972.) On appeal, the appellant bears the burden of demonstrating error. (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718.) We will affirm the trial court's ruling if it is correct on any applicable theory of law. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

II. *Analysis*

The Fourth Amendment to the United States Constitution bans all unreasonable searches and seizures. (*United States v. Ross* (1982) 456 U.S. 798, 825 (*Ross*).) "The ultimate standard set forth in the Fourth Amendment is reasonableness." (*Cady v. Dombrowski* (1973) 413 U.S. 433, 439; *Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 652.) "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires the balancing of the need for the particular search against the invasion of personal rights that the search entails." (*Bell v. Wolfish* (1979) 441 U.S. 520, 559.) "The inquiry is substantive in nature, and consists of a subjective and an objective component." (*People v. Ayala* (2000) 23 Cal.4th 225, 255.) To claim Fourth Amendment protection, the defendant must show " 'a subjective expectation of privacy that was objectively reasonable.' [Citation.]" (*Ibid.*)

"Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant [citation]." (*Vernonia School Dist. 47J v. Acton, supra,* 515 U.S. at p. 653.) Thus, the general rule is that " 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the *Fourth Amendment*—subject only to a few specifically established and well-delineated exceptions.' (*Katz v. United States* [(1967)] 389 U.S. 347, 357.)" (*Arizona v. Gant* (2009) __ U.S. __, __ [129 S.Ct. 1710, 1716] (*Gant*).) Under *New York v. Belton* (1981)

453 U.S. 454 (*Belton*) and *Thornton v. United States* (2004) 541 U.S. 615, 632 (*Thornton*), for example, an officer may conduct a vehicle search incident to an arrest "when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest." (*Gant, supra,* __ U.S. at p.__ [129 S.Ct. at p. 1721].) And if there is probable cause to believe a vehicle contains evidence of criminal activity, under *United States v. Ross,* 456 U.S. at pp. 820-821, an officer may search any area of the car in which the evidence might be found. (See also, *California v. Acevedo* (1991) 500 U.S. 565, 579 (*Acevedo*).)

This latter exception to the warrant requirement is known as the automobile exception. It permits searches for evidence relevant to offenses other than the offense of arrest and the permissible scope of such a search is broader than *Belton* and *Thornton* allow in the context of a search incident to arrest. (*Gant, supra,* __ U.S. at p.__ [129 S.Ct. at p. 1721].) The automobile exception is rooted in "the historical distinctions between the search of an automobile or other conveyance and the search of a dwelling." (*People v. Superior Court (Nasmeh)* (2007) 151 Cal.App.4th 85, 100.) These distinctions recognize a vehicle's inherent mobility (*ibid; California v. Carney* (1985) 471 U.S. 386, 392-394, fn. 3) and acknowledge a reduced expectation of privacy in a vehicle compared to a dwelling. (*Gant, supra*, at p. ___ [129 S.Ct. at p. 1720].) "[A]n individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband." (*Ross, supra,* 456 U.S. at p. 823.)

"In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." (*Ross, supra*, 456 U.S. at p. 809, fn. omitted.) This threshold standard means " 'a fair probability that contraband or evidence of a crime will be found,' [citation] . . . ." (*Alabama v. White* (1990) 496 U.S. 325, 330.) Probable cause to search thus exists

"where the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief that contraband or evidence of a crime will be found, [citation]." (*Ornelas v. United States* (1996) 517 U.S. 690, 696.) Said another way, "[p]robable cause for a search exists where an officer is aware of facts that would lead a [person] of ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion that the object of the search is in the particular place to be searched. [Citations.]" (*People v. Dumas* (1973) 9 Cal.3d 871, 885.) Specific to the automobile exception then, "If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross* . . . authorizes a search of any area of the vehicle in which the evidence might be found." (*Gant, supra*, __ U.S. at p. __ [129 S.Ct. at p. 1721], citing *Ross, supra*, 456 U.S. at pp. 820-821.) This means the search may extend to "every part of the vehicle and its contents that may conceal the object of the search." (*Ross, supra*, 456 U.S. at p. 825; see also *Wyoming v. Houghton* (1999) 526 U.S. 295, 307 [passenger's belongings]; *People v. Chavers* (1983) 33 Cal.3d 462, 468 [glove compartment and shaving kit within it].)

We conclude that on the facts of this case, Officer Cook's search of Chho's phone that revealed two incriminating text messages was constitutionally permissible under the automobile exception.[5] This penultimate conclusion follows from the corollary determination that on this record, the officer had probable cause to open the phone and

[5] This conclusion obviates the need for us to analyze whether the search of the cell phone contents fell under any other exception to the warrant requirement. In other words, we need not and do not determine whether Chho's consent to search the vehicle was broad enough to include the contents of his cell phone or whether the officer's viewing of the two text messages was permissible as a search incident to Chho's arrest for evidence of the offense under *Belton* and *Thornton*, as recognized in *Gant*, though this latter exception to the warrant requirement arguably might also be applicable as the People urge. (*Gant, supra*, ___ U.S. at pp. _____ [129 S.Ct. at pp. 1714, 1719, 1721, 1723-1724.)

view the text messages. It is without dispute that Chho gave his consent for Officer Cook to search under the seat and in the trunk, where he found a total quantity of marijuana that reasonably suggested to the officer it was possessed for sale rather than personal use. There is no dispute that during the entire course of the stop, the cell phone was continuously ringing. This degree of phone activity in the context of a traffic stop during which a quantity of drugs for sale have been permissibly found in the car was enough to reasonably establish probable cause, which we measure in each case against the totality of the circumstances. (*Illinois v. Gates* (1983) 462 U.S. 213, 230-231; *People v. Carvajal* (1988) 202 Cal.App.3d 487, 498.) Emphasizing this point, the Supreme Court has noted that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." (*Illinois v. Gates, supra*, 462 U.S. at p. 232.) "A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required. [Citation.]" (*Texas v. Brown* (1983) 460 U.S. 730, 742.)

Although the officer here did not have a lot of experience and this was his first arrest for drug sales, he testified that based on his training and experience, the continuous ringing of a cell phone, coupled with his discovery of what turned out to be more than six ounces of marijuana in the car's trunk, led him to suspect that defendant may be engaged in drug dealing or other illegal activity. This testimony was enough to support the trial court's factual determination that the officer reasonably believed that the cell phone contained evidence of drug sales and its legal conclusion that the officer's belief was supported by probable cause, justifying the search. As noted, under the automobile exception, if there is probable cause to believe a vehicle contains evidence of criminal activity, police may search any area within the vehicle in which the evidence might be found. (*Gant, supra*, __ U.S. at p. ___ [129 S.Ct. at p. 1721], citing *Ross, supra*, 456 U.S. at pp. 820-821.) No exigency is required and it matters not that a warrant could later

be obtained in order to conduct the search. (*Acevedo, supra*, 500 U.S. at pp. 569-581; *Maryland v. Dyson* (1999) 527 U.S. 465, 466-467; *People v. Hughston* (2008) 168 Cal.App.4th 1062, 1068.) As long as circumstances establish the existence of probable cause sufficient to obtain a warrant, police may probingly search an entire vehicle and its contents without a warrant under the automobile exception. (*Ross, supra*, 456 U.S. at pp. 808-809, fn. omitted; *Pennsylvania v. Labron* (1996) 518 U.S. 938, 940.)

Citing to case law not addressing the automobile exception but instead focusing on searches incident to arrest, defendant challenges the conclusion that there was probable cause to support the cell phone search. He contends that Officer Cook did not maintain a reasonable belief that the cell phone contained evidence relevant to drug sales, thus precluding the search. This contention is based on the observations that modern cell phones are in many ways like mini computers that store loads of information and that "these days, practically everyone has a cell phone" and many people make calls around 5:00 p.m. that are perfectly innocent.

But it does not follow from the pervasive use of modern cell phones by the general population in the early hours of the evening that Officer Cook did not have a reasonable belief that defendant's cell phone contained evidence of illegal activity when he opened it and viewed the incriminating text messages. Defendant forgets the key fact that when the officer did so, he had just discovered over six ounces of marijuana in the car. The officer did not search the phone before that discovery, when defendant's argument might carry more weight. The officer testified that the presence of that quantity of marijuana *coupled with* the continuous ringing of the phone throughout the stop led to his belief that defendant was engaged in drug sales or other illegal activity. (See, e.g., *People v. Vanvalkenburgh* (1983) 145 Cal.App.3d 163, 167 [intervening discovery of large quantity of drugs and cash in otherwise lawful search of house was enough to render incoming telephone calls suspect and justified officers' interception of the calls].) Based

on the totality of the circumstances, these facts together reasonably established the probability of criminal activity—regardless of the technology involved in modern cell phones and the pervasiveness with which the society at large currently engages in innocent cell-phone use—and permitted the search of the car and all of its contents under the automobile exception. (*Illinois v. Gates, supra*, 462 U.S. at p. 243, fn. 13 [innocent behavior will frequently provide basis for probable cause, which does not require an actual showing of criminal activity, and the inquiry focuses on the degree of suspicion that attaches to particular types of non-criminal acts].)

This conclusion is not disturbed by defendant's citation to and discussion of several cases analyzing the propriety of cell-phone searches incident to arrest. (See, e.g., *U. S. v. Finley* (5th Cir. 2007) 477 F.3d 250 [search of cell phone incident to arrest upheld as phone was appurtenant to defendant's person and not a possession]; *U. S. v. Ortiz* (7th Cir. 1996) 84 F.3d 977 [transient and disappearing nature of information received by pager constituted exigency justifying warrantless search]; *U. S. v. Zavala* (5th Cir. 2008) 541 F.3d 562 [officers lacked probable cause to arrest and therefore could not search cell phone incident thereto]; *United States v. Lasalle* (D. Hawaii 2007, May 9, 2007, No. 07-00032) 2007 U.S. Dist. Lexis 34233 [later warrantless search of phone taken from defendant upon arrest was too remote in time to be incident thereto]; *United States v. Park* (N.D. Cal., May 23, 2007, No. CR 05-375 SI) 2007 U.S. Dist. Lexis 40596 [cell phone was not on defendant's person but was rather a possession within his immediate control at arrest; thus, post-arrest search of phone was not contemporaneous or incident to custodial arrest and required a warrant]; *State v. Smith* (2009) 124 Ohio St.3d 163 [920 N.E. 2d 949] [on facts of case, warrantless search of data within cell phone was not permissible as search of container incident to arrest as search was unnecessary for

officer safety and there were no exigent circumstances].)[6] On the facts of this case, whether a cell phone constitutes a closed container; whether it is a possession as opposed to being appurtenant to an arrestee's person; the storage capacity of the phone so as to establish exigency; and the timing and location of the search relative to defendant's arrest are irrelevant. These factors simply do not bear on our analysis and conclusion in this case, which is premised on the automobile exception to the warrant requirement. The application of this exception here was established by the existence of probable cause, supported by Officer Cook's reasonable belief in the circumstances that defendant was engaged in drug sales or other illegal activity and that the cell phone contained evidence of this.

[6] We note that the California Supreme Court has granted review in *People v. Diaz* (2008) 165 Cal.App.4th 732, review granted Oct. 28, 2008, S166600, in which the issues are stated to be whether the defendant's cell phone was an item "immediately associated with the person of the arrestee" within the meaning of *United States v. Edwards* (1974) 415 U.S. 800, and thus subject to search incident to his arrest, and whether the search of the cell phone an hour and a half after arrest while defendant was being interrogated was invalid under *U.S. v. Chadwick* (1977) 433 U.S. 1, 15. But we do not perceive that the outcome of this case in the Supreme Court would affect our analysis or conclusion in the instant case.

DISPOSITION

The judgment is affirmed.

Duffy, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Mihara, J.